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No. 84-719

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK WAYNE, ET UX. PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
(615) 632-2241

JAMES E. FOX
Associate General Counsel

BRENT R. MARQUAND
Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902

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Petitioners contend that the court of appeals should have applied a federal common law statute of limitations in this tort action, that the court of appeals misinterpreted the nature of the applicable Tennessee statute of repose, and that the Tennessee statute denies them equal protection.

1. In 1968, petitioners began building a house in Hardin County, Tennessee. To construct the basement walls, petitioners purchased concrete blocks manufactured in Mississippi by respondent Tupelo Concrete Products Company (Tupelo) (Pet. App. 5). The blocks were made from phosphate slag produced in Alabama by the Tennessee Valley Authority (TVA) as a byproduct of its fertilizer manufacturing operation (*ibid.*). Petitioners moved into the completed house in 1969. In early 1979, however, petitioners discovered that phosphate slag contains materials that may

give off dangerous radiation.[1] When tests later that year revealed a higher than normal radioactivity level in the house, petitioners moved out (Pet. App. 6).

In 1981, petitioners brought this tort action against TVA and Tupelo in the United States District Court for the Southern District of Mississippi. The district court dismissed the action. It ruled that substantive Tennessee law governed the suit, and pointed to the provision of the Tennessee Products Liability Act (Tennessee Act) (Tenn. Code Ann. § 29-28-103 (1980)) that bars any products liability action brought more than ten years after the plaintiff's purchase of a defective or dangerous product (Pet. App. 35).

The court of appeals affirmed (Pet. App. 1-29). It rejected petitioners' suggestion that it apply a federal common law statute of limitations instead of the Tennessee Act; the court noted that "[f]ederal common law is developed when it must answer uniquely federal problems" (Pet. App. 15) and that no compelling federal interests exist in this case (*id.* at 16). The Fifth Circuit also held that the 10-year bar in the Tennessee Act is a substantive "statute of repose" rather than a procedural statute of limitations, and as substantive law was properly applied in this case by the district court (Pet. App. 21-24).[2] Finally, the court of appeals concluded

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[1]In December 1978, TVA, in response to reports that phosphate slag might present health hazards, stopped making the slag available for home construction pending further study (Pet. App. 8). In 1980, Congress prohibited the Environmental Protection Agency (EPA) from regulating phosphate slag for a period of six months after it had completed a full study of the product. 42 U.S.C. 6921(b)(3)(A). EPA accordingly designated phosphate slag a nonhazardous waste pending completion of such a study. 40 C.F.R. 261.4(b)(7).

[2]The court of appeals noted that a statute of repose terminates the underlying cause of action and therefore is "substantive," while a statute of limitations affects the availability only of the remedy and therefore is procedural (Pet. App. 19-21).

that the Tennessee legislature acted rationally in creating exceptions to the Tennessee Act's ten-year limitation (Pet. App. 28).

2. In this Court, petitioners repeat the arguments rejected by the Fifth Circuit. They are without merit and do not warrant further review.

a. The court of appeals acted correctly in declining to create a federal common law statute of limitations to govern this action. This Court consistently has held — whether or not the federal government or one of its instrumentalities is a party to the litigation — that the question "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 310 (1947). See *Miree* v. *DeKalb County*, 433 U.S. 25, 29 (1977); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). State law may appropriately be applied when doing so will not "frustrate specific objectives of * * * federal programs," and when "there is little need for a nationally uniform body of law." *Kimbell Foods*, 440 U.S. at 728. Conversely, creation of a federal rule is in order when the case "raise[s] issues of uniquely federal concern." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95 (1981).

Here, no such federal concerns exist. As the court of appeals noted, "[i]n the absence of comprehensive federal regulation of the use of phosphate slag" (see n. 1, *supra*), it is difficult to find a "uniquely federal need to regulate the *time* for enforcing rights" related to use of the slag (Pet. App. 16 (emphasis in original)). Indeed, TVA's substantive liability in actions such as this one is determined by reference to state

law (see, *e.g.*, *Jackson* v. *Tennessee Valley Authority*, 413 F. Supp. 1050, 1055 (1976), reinstated after remand, 462 F. Supp. 45 (M.D. Tenn. 1978), aff'd, 595 F.2d 1120 (6th Cir. 1979)); petitioners do not contend that the lower courts should have created special federal liability rules to govern this action. Yet if the nature of the federal interest in this case does not demand application of a uniform federal substantive rule, absent extraordinary circumstances it surely does not require application of a federal statute of limitations. Cf. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109-110 (1945).

Finally, petitioners plainly are incorrect when they argue (Pet. 10) that federal agencies and instrumentalities should in no event be required to face inconsistent state limitations rules. To the contrary, Congress explicitly has excluded TVA from the reach of 28 U.S.C. 2401, which creates a uniform limitations period for tort claims brought against most federal agencies. See 28 U.S.C. 2680(*l*); Pet. App. 10-11.

b. Petitioners also maintain that the Mississippi courts would view the ten-year bar in the Tennessee Act as a procedural rather than as a substantive rule, and therefore would apply Mississippi's own statute of limitations.[3] Petitioners base this argument on the twin propositions that Tennessee does not distinguish between statutes that eliminate a right and those that simply bar a remedy, and that, in any event, a statute of repose may be viewed as substantive only when it limits the exercise of a right that was unknown at common law.

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[3]Petitioners do not challenge the court of appeals' conclusion that, under Mississippi choice of law rules, Tennessee's substantive law should govern in this case (see Pet. App. 16-19).

Both of these propositions are baseless. As both courts below concluded (see Pet. App. 19-21, 33, 35), Tennessee does recognize a distinction between statutes that extinguish rights and those that bar remedi . See *Buckner* v. *GAF Corp.*, 495 F. Supp. 351, 355 (E.D. Tenn. 1979), aff'd, 659 F.2d 1080 (6th Cir. 1981). Those courts then correctly held that the Tennessee Act must be viewed as a statute of repose because it "obviously terminates the very cause of action ten years from the time of purchase" (Pet. App. 21). As for petitioners' second point, the court of appeals noted that it "is flawed in that it assumes that legislatures are precluded from altering or eliminating common law causes of action" (*id.* at 23). This plainly is not the law. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 58, 89 n.32 (1978). It thus appears that the Mississippi courts would reject the distinction drawn by petitioners. See generally *Ramsay* v. *Boeing Co.*, 432 F.2d 592, 596-598 (5th Cir. 1970).[4] In any event, further review of these state law issues is not warranted.

c. Finally, petitioners contend that the Tennessee Act denies them equal protection by creating an exception to its ten-year limit for asbestos-related injury claims (Tenn. Code Ann. § 29-28-103(b) (1980)) but not for claims involving phosphate slag. As the court of appeals noted, however (Pet. App. 28), asbestos is regulated as an air pollutant (40

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[4]Petitioners contend that the decision below is in conflict on this point with *Maki* v. *George R. Cook Co.*, 124 F.2d 663 (6th Cir. 1942). But *Maki* involved Michigan rather than Mississippi choice of law rules. In any event, the Sixth Circuit held only that a bar to the exercise of a statutorily-created right would be regarded as substantive; it did not hold that a bar to the exercise of a common law right would be regarded as procedural.

C.F.R. 61.20 to 61.22 (1981ed.)); in contrast, the Environmental Protection Agency has classified phosphate slag as a nonhazardous waste (40 C.F.R. 261.4(b)(7)). Of itself, this difference between the substances supports the distinction drawn by the Tennessee legislature. See *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Associate General Counsel

BRENT R. MARQUAND
Attorney
Tennessee Valley Authority

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